

EMPIRICAL RESEARCH IN PROPERTY:  
VICKI BEEN AS ROLE MODEL

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ABSTRACT

From the outset of her career, Vicki Been has written articles with an empirical focus. Her important works discuss, among other topics, exactions, environmental challenges to the location of locally unwanted land uses, and the effects of land uses on nearby property values. In 2014, she co-authored a standout article on the politics of rezoning in New York City. She and her co-authors found that, even in the nation's densest city, homeowners opposed to development usually have the power to thwart densification.

Law professors generally have done less than both economists and historians to reveal the functioning of property institutions. Nonetheless, legal analysts have made important contributions. In addition to the works of Vicki Been, the Essay highlights the findings of, among others, Thomas Merrill on public use issues, Krier and Sterk on takings, Ward Farnsworth on bargaining over a nuisance dispute, and Henry Hansmann on the rise of condominium ownership.

To be relevant, an empirical project needs a theoretical underpinning. The Essay concludes with a dab of theory. Scott Shapiro, a legal philosopher, stresses the importance of plan-making to individuals, families, business firms, and governments. I assert that predictable property rights are a prerequisite to successful planning. My confidence in attending this conference, for example, depended on stable property rules. The rules that underlie private property played an essential part, but the rules of public and communal property crucially supplemented them.

INTRODUCTION

Vicki Been exemplifies the virtues of empirical scholarship in property law. In this brief Essay, I document some of her many

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achievements, and highlight both what property scholars have accomplished on the empirical front and have yet to accomplish. Good empiricism, of course, requires an underlying theory that indicates the relevance of the results presented. I end the Essay with a dollop of theory. An unsung virtue of private property, indeed also of communal and open-access property, is its capacity to enable individuals, households, kinship groups, firms, and governments to pursue plans, confident that the future legal protection of property rights of all types will make those plans achievable.

### I. EMPIRICISM, VICKI BEEN—STYLE

Vicki showed her empirical bent from the get-go. Her first major article, on development exactions, included a review of what was known about the practice.<sup>1</sup> She then wrote several articles on the siting of locally undesirable land uses (“LULUs”), such as waste dumps. These tend to be located in relatively impoverished neighborhoods. But does this pattern result from ex ante discrimination by sponsors of LULUs, or from an influx of poorer residents after a LULU had opened? According to Vicki, much evidence, although hardly all, supports the influx hypothesis.<sup>2</sup> Some of her more recent co-authored work has investigated, empirically, the effects of historic districts and community gardens on nearby property values,<sup>3</sup> the nature of inclusionary zoning practices,<sup>4</sup> and the use of Community Benefits Agreements.<sup>5</sup>

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1. Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 478–83 (1991).

2. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); see also Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9 (1997) (finding no substantial evidence that LULUs had been sited in predominantly African-American neighborhoods, but significant evidence that Hispanic neighborhoods had been targeted).

3. Vicki Been, Ingrid Gould Ellen, Michael Gedal, Edward Glaeser & Brian J. McCabe, *Preserving History or Restricting Development? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, 92 J. URB. ECON. 16 (2016); Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241 (2008) (finding positive effect).

4. Jenny Schuetz, Rachel Meltzer & Vicki Been, *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. AM. PLAN. ASS’N 441 (2009).

5. Vicki Been, *Community Benefits: A New Local Government Tool or Another Variation on the Exactions Theme*, 77 U. CHI. L. REV. 5 (2010).

Vicki and I have co-authored several editions of a casebook on land use. Recently Rick Hills and Chris Serkin have joined us as editors. Because Vicki and I share a passion for land use issues, I single out for highest praise a 2014 work that Vicki co-authored on the politics of zoning changes in New York City.<sup>6</sup> Because homeowners are unusually scarce in New York City, that jurisdiction is one of the last places where one would expect William Fischel's "homevoters"<sup>7</sup> to control the rezoning process. Vicki and her co-authors found, nevertheless, that New York City zoning officials tend to be responsive to homeowners' NIMBYish desires. Residential development has come to be overregulated in many parts of the United States, New York City included.

Early in her career, Vicki tended to undertake empirical work on her own. During the past two decades, by contrast, Vicki commonly has worked with co-authors more skilled than the average law professor at number crunching. The article I just referred to, *Are Homevoters Overtaking the Growth Machine?*, is illustrative. Vicki co-authored that article with two co-authors, one of them Simon McDonnell who had earned a PhD in economics. In this, and many other ways, Vicki has served as a role model.

## II. LANDMARKS IN THE EMPIRICAL LITERATURE ON PROPERTY

To date, economists have been the leading empirical analysts of property institutions.<sup>8</sup> Historians arguably come next.<sup>9</sup> Work by law professors is on the rise, but literally infinite possibilities remain.

A century ago, property scholars primarily examined pertinent legal materials such as judicial opinions and statutes. These endeavors of course were useful, but risked saying little about the true functions of property law as a social institution. Some property scholars have

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6. Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014).

7. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

8. See, e.g., FISCHEL, *supra* note 7; Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426 (2011).

9. See, e.g., HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870* (1983); JOHN FREDERICK MARTIN, *PROFITS IN THE WILDERNESS: ENTREPRENEURSHIP AND THE FOUNDING OF NEW ENGLAND TOWNS IN THE SEVENTEENTH CENTURY* (1991).

intensely examined the facts of a particular lawsuit. Outstanding examples are Eric Kades's several articles on *Johnson v. M'Intosh*,<sup>10</sup> a case involving competing claims of land title;<sup>11</sup> Angela Fernandez's book on the famous litigation over ownership of a fox pelt (*Pierson v. Post*);<sup>12</sup> and the Baucells and Lippman article on a partition case (*Delfino v. Vealencis*).<sup>13</sup> Andrew Morriss and Gerald Korngold's *Property Stories*, first published in 2004, continues this emphasis on the dissection of particular property disputes.<sup>14</sup> Vicki, in fact, contributed a chapter to *Property Stories*.<sup>15</sup> She discussed *Lucas v. South Carolina Coastal Council*,<sup>16</sup> a famous takings decision that virtually all property casebooks include.<sup>17</sup>

Several scholars have striven, somewhat more ambitiously, to quantify the reported cases on a public law issue of particular concern to property professors. A first example is Thomas Merrill's study of appellate decisions on the issue of whether a government exercising the power of eminent domain was doing so for "public use." Merrill found that, between 1954 and 1986, no federal courts had ruled that a public use was lacking, but that 16% of state court decisions had so ruled.<sup>18</sup> A second valuable study is the Krier and Sterk tally of cases involving the takings issue. Krier and Sterk found that federal courts had provided a takings claimant relief in only 5% of cases (with half reversed on appeal), but that state courts had provided relief in 11% of cases.<sup>19</sup> Because land use regulation is

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10. 21 U.S. (8 Wheat.) 543 (1823).

11. Eric Kades, *History and the Interpretation of the Great Case of Johnson v. M'Intosh*, 19 L. & HIST. REV. 67 (2001); Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

12. ANGELA FERNANDEZ, *PIERSON V. POST, THE HUNT FOR THE FOX* (2018) (discussing 3 Cai. R. 175 (N.Y. Sup. Ct. 1805)).

13. Manel Baucells & Steven A. Lippman, *Justice Delayed Is Justice Denied: A Cooperative Game Theoretic Analysis of Hold-Up in Co-Ownership*, 22 CARDOZO L. REV. 1191 (2001) (discussing 436 A.2d 27 (Conn. 1980)).

14. PROPERTY STORIES (Gerald Korngold & Andrew P. Morriss eds., 2004).

15. Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation*, in PROPERTY STORIES, *supra* note 14, at 221–58.

16. 505 U.S. 1003 (1992).

17. See, e.g., JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL S. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 1179–95 (8th ed. 2014); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1279–93 (3d ed. 2017).

18. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 96 (1986).

19. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 66, 77–78 (2016).

largely a state and local affair, federal judges seem inclined to steer clear of the public law issues involved. Both the Merrill and Krier-Sterk findings are in tension with the Priest-Klein hypothesis that a plaintiff can be expected to prevail in around 50% of cases.<sup>20</sup> Perhaps claimants in public-use and takings cases are driven in part by ideological objections to perceived overreachings by governments.

Land records, mostly maintained in the United States by county governments, contain a wealth of information that few historians have tapped. Law professors, more comfortable with this source, could do far more than they have. The cupboard, of course, is not entirely bare. N. William Hines found that in 1933, less than 1% of Iowa transferees had chosen to take title as joint tenants, but by 1954, the percentage had increased to 46%.<sup>21</sup> Two older studies document the popularity of real estate covenants. Helen Monchow's survey, published in 1928, examined 84 U.S. covenant schemes in various states, most imposed in the 1920s.<sup>22</sup> Zigurds Zile's study, which appeared in 1959, examined 100 covenant schemes in Waukesha County, Wisconsin, part of Greater Milwaukee.<sup>23</sup> Since 1959, however, law professors have not systematically sampled covenants in the land records. Today, the drafter of a deed is unlikely to use a defeasible fee. But no law professor studying recorded deeds has determined just how unlikely.<sup>24</sup> Of contemporary scholars, Maureen Brady stands out for her creative use of land records to divine prevailing legal practices.<sup>25</sup>

Other potentially fruitful topics are the dynamics of condominium associations and other common-interest communities. Henry Hansmann's outstanding empirical article sets the gold standard for

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20. George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 20 (1984).

21. N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 586 n.16 (1966).

22. HELEN C. MONCHOW, *THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT* (Inst. for Rsch. in Land Econ. & Pub. Utils. 1928).

23. Zigurds L. Zile, *Private Zoning on Milwaukee's Metropolitan Fringe, Problems of Drafting—Part II*, 1959 WISC. L. REV. 451. Developers had recorded most of the covenants in Zile's sample in the early 1950s.

24. By 1985, fifteen states had sought to limit drafters' use of defeasible fees. Todd T. Erickson, Note, *Forfeiture of a Public School: A Need to Control the Defeasible Fee*, 63 WASH. U. L.Q. 109, 126–29 (1985).

25. See, e.g., Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872 (2019); Maureen E. Brady, *The Failure of America's First City Plan*, 46 URB. LAW. 507 (2014).

work on that front.<sup>26</sup> Lee Anne Fennell and Paula Franzese, among others, also have usefully analyzed how these communities operate.<sup>27</sup> To my knowledge, however, no law professor has undertaken field studies of particular communities. We know little about the nature of resident gripes, the frequency of amendments to declarations of covenants, and whether large associations are less closely knit than small ones.

Nuisance law inspired a fine empirical study by Ward Farnsworth, a scholar of torts. Farnsworth investigated whether litigants actually engage in Coasean bargaining after final judgment in a nuisance case.<sup>28</sup> In the twenty cases he studied, he found none in which the parties had engaged in post-judgment bargaining. Animosity between the parties, Farnsworth speculates, obviated chances of later compromise.

Another frontier is the comparative study of property law. Over time, property law doctrines tend to converge on some issues and diverge on others. A few rules of property law appear to be virtually universal. Felix Cohen once famously implied, but did not assert, that all societies would award ownership of a newborn animal to the owner of the mother.<sup>29</sup> Most societies embrace the *numerus clausus* principle that limits the forms of private ownership<sup>30</sup> and permit the leasing of both real estate and chattels.<sup>31</sup> Yet property systems commonly diverge. Every state in the United States has a version of the doctrine of adverse possession, under which a squatter, even one in bad faith, can wrest title from a true owner.<sup>32</sup> Many nations, by contrast, have a system of title registration, as opposed to title recordation. In a nation with a registration system, an adverse possessor cannot oust a true owner. An ousted squatter, however, may have

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26. Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25 (1991).

27. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829; Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553 (2002).

28. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999).

29. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 366–69 (1954).

30. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

31. Thomas W. Merrill, *The Economics of Leasing*, 12 J. LEGAL ANALYSIS 221 (2020).

32. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1985).

a successful cause of action for damages against the government that operates the registration system.<sup>33</sup>

On the comparative study of property law, the leading scholar is Yun-chien Chang of Academia Sinica, Taiwan. Chang, who often publishes with co-authors, seeks to find both doctrinal commonalities and doctrinal divergences in private law doctrine.<sup>34</sup> In some of his work, Chang identifies clusters of nation-states that tend to be like-minded.<sup>35</sup>

Among property law professors, Vicki Been's empirical inclinations have been truly exemplary. More should follow her lead.

### III. HOW PROPERTY LAW ENABLES ACTORS TO ACHIEVE THEIR PLANS

My colleague Scott Shapiro, a specialist in legal philosophy, has authored *Legality*, a lively book that includes a brief section on property.<sup>36</sup> One of Shapiro's central themes is that individuals and collectivities frequently develop *plans* to chart their future activities.<sup>37</sup> My central thesis in this section is that a stable system of property rights enables actors to develop plans with confidence that they will succeed.

To illustrate this point, I use the mundane example of my attendance at this year's Brigham-Kanner Property Rights Conference at William & Mary Law School. In making plans to attend this event, I was confident that I could rely on government enforcement of all three of the archetypal forms of property—namely, private property, open-access (public) property, and communal property.

First, I considered the role of private property. I started my trip by packing a bag of personal belongings, confident that social norms and the legal system would help assure the protection of these holdings.

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33. Nadav Shoked, *Who Needs Adverse Possession?*, 89 FORDHAM L. REV. 2639 (2021) (contending that title registration is superior, but that the title insurance industry lobbies to keep the recordation system, and hence adverse possession law, in place).

34. See, e.g., Yun-chien Chang & Henry E. Smith, *Convergence and Divergence in Systems of Property Law: Theoretical and Empirical Analyses*, 92 S. CAL. L. REV. 785 (2019).

35. Yun-chien Chang, Nuno Garoupa & Martin T Wells, *Drawing the Legal Family Tree: An Empirical Comparative Study of 170 Dimensions of Property Law in 129 Jurisdictions*, 13 J. LEGAL ANALYSIS 231 (2021).

36. SCOTT J. SHAPIRO, LEGALITY 158–61 (2011).

37. See, e.g., *id.* at 118–53 (chapter 5, “How to Do Things with Plans”).

I then drove my car from New Haven to Bradley Airport near Hartford, and at Richmond International Airport, arranged for a rental car. Institutions of private property enabled me to make those vehicular arrangements. Most important, in considering the trip, I assumed that I could afford the expenses involved. Legal protection of my financial resources gave me the confidence to attend.

Second, my trip to Williamsburg also was premised on open-access (public) property in some resources. The airplane that transported me from Bradley Airport to Richmond Airport passed over numerous private parcels of land. Traditionally, the private owner of land had ownership from the center of the earth to the heavens, and the theoretical power to enjoin overflights.<sup>38</sup> Courts and agencies rightly have rejected this traditional rule, making air travel possible.<sup>39</sup>

Third, I undertook my trip with confidence that the communal rights of William & Mary Law School would be protected. The success of a Brigham-Kanner conference, like any other conference, is largely determined by whether the sponsoring organization is entitled to exclude free riders, thereby limiting attendance to invitees. In coming to Williamsburg, I was confident that Virginia law would protect William & Mary's rights to put on an event restricted to invited communards. In sum, although private property primarily enabled me to attend this conference, I also relied on the protections of both open-access property and communal property.

Many different entities engage in the planning that Shapiro envisions. In a liberal society, individuals do much of the planning but also routinely coordinate with one another. A family that successfully meets for a Thanksgiving dinner has engaged in planning. In most nations, families and households are crucially involved in child-rearing responsibilities. The institutions of civil society, such as nonprofit organizations like William & Mary, also prepare plans, helped by a stable system of property rights. In a capitalist economy, also important are the plans of business firms, large and small. When property rights are predictable, the more successful business planning can be. Finally, governments themselves prepare plans. Governmental plans include legal rules such as those of property law.

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38. A Latin maxim stated "cujus est solum, ejus est usque ad coelum et ad inferos" (he who owns the soil owns also to the sky and to the depths).

39. See, e.g., *Hinman v. Pacific Air Transport*, 84 F.2d 755 (1936).



In a liberal society, governments enable the decentralization of planning capabilities to all of the entities mentioned—individuals, families, households, firms, governments, and the institutions of civil society. Libertarians commonly emphasize the rights of individuals. Much of property law, however, aims to soften inclinations to act individualistically.<sup>40</sup> It does this when it allows co-ownership and the creation of the institutions of civil society, including business entities. In a totalitarian society, in sharp contrast to a liberal society, the state aspires to monopolize the power to plan. This invariably proves to be a fool's errand, as history amply proves.

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40. See Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857 (2014).

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